



MULTISTATE TAX COMMISSION

To: Executive Committee
From: Gregory S. Matson
Date: November 7, 2019
Subject: Report of the Executive Director

This report is a summary of the Commission's organizational and staff activities for the period July 1, 2019, through September 30, 2019 (unless otherwise noted).

I. Programs & Activities

A. Joint Audit Program

The Joint Audit Program completed parts of 5 corporate income tax audits during the first quarter of fiscal year 2020. The program also completed and closed 5 sales tax audits and parts of 7 other sales tax audits during the first quarter. There are 19 income and 35 sales tax audits in progress.

The Joint Audit Program proposed assessments of \$3,359,790 for the corporate income tax audits and \$1,397,426 for the sales tax audits completed during fiscal year 2020.

The following chart summarizes hourly data for completed audits for the audits completed through September 30, 2019, for the fiscal year end June 30, 2020:

	Income & Franchise	Sales & Use	Total
Total Audits	0	5	5
Total States Audited	0	49	49
Total Hours	0	7825.5	7825.5
Average Hours per State	0	160	160

The Audit Committee met on August 5, 2019, in Boise, Idaho. This was the first meeting for the committee in fiscal year 2020. During the meeting in Boise, the committee discussed the progress of current audits. The time had come to add new companies to our sales tax audit inventory. The committee reviewed the companies recommended for a sales tax audit, along with the voting results by the member states. The committee voted to add 10 of those companies to the inventory. Bruce Fort, senior counsel, and Chris Barber, counsel, provided an update on recent state and local tax cases and we ended with a round table discussion.

B. National Nexus Program

Multistate Voluntary Disclosure Program

The results for the first quarter of fiscal year 2020 are provided below:

- Nexus states' collections: \$5,261,190 \$14,695,429 in FY 2019)
- Non-Nexus state collections: \$0 (\$48,892 in FY 2019)
- Nexus states' executed contracts: 82 (379 in FY 2019)
- Nexus states' average contract value: \$64,161 (\$38,774 FY 2019)

The above amounts include funds received by the Commission or paid by the taxpayer directly to the states and reported to the Commission. Interest on back tax paid and the ongoing value of a new taxpayer are not included.

Membership

There are currently thirty-eight participating states (including the District of Columbia) in the program. Commission staff continues to reach out to non-member states.

Outreach

Staff continues to urge states to put a link to the program on their voluntary disclosure web pages.

Nexus Schools

Please let a member of the Commission staff know if your state would like to host a Nexus School.

Amnesties

The program posts on its web page a list of upcoming and current state tax amnesties. Please inform program staff if you would like the Commission to post your state's amnesty.

Staffing

The program presently has four permanent full-time staff members: Richard Cram, director, Diane Simon-Queen, voluntary disclosure program manager, Michelle Lewis, paralegal, and James Lee, program specialist.

C. Legal Division

The legal division staffs the Uniformity Committee and its various work groups (including research, drafting, presentations, and reports); staffs the Litigation Committee; provides attorney and other training; offers litigation support and legal advice to states; provides legal support to the Commission and its programs and projects (including the Joint Audit and National Nexus Programs and general administrative functions); and files amicus briefs on behalf of the Commission. Members of the legal division also regularly speak at conferences and seminars and publish articles in tax journals (as detailed elsewhere in this report).

Uniformity Work

This year, the legal division has worked staffing the following uniformity projects:

- Partnership Informational Project
- Model *Finnigan* Combined Filing Approach
- Wayfair Implementation and Marketplace Facilitator Work Group*
- Updated P.L. 86-272 Statement of Information

*The primary staff for this project was Richard Cram, director of the Commission's National Nexus Program.

Litigation Committee Work

The legal division staffed the Litigation Committee at its meeting in Boise, Idaho, on August 6, 2019, helping to provide presentations at the meeting. During the meeting the committee hosted Jasper Cummings for a discussion of [What is the Anti-Deference Movement Really About?](#), followed by a question and answer session. The presentation was webcast, with lawyers from numerous states participating.

Attorney and Other Training

The legal division participates in two types of Commission training—structured courses on topics related to multistate taxation and facilitated roundtable discussions for particular states. The structured courses may cover both legal and audit topics and the facilitated roundtable discussions are customized for states based on the cases or issues they would like to discuss. When providing training, the legal division often works in conjunction with Commission audit staff. Training conducted so far this year included a two-day facilitated course in South Carolina.

In addition, the legal division was heavily involved in planning and presenting a recently launched general corporate income tax training course. The inaugural course, which took place in Itasca, Illinois, was not state-specific, but offered a comprehensive look at corporate taxation for auditors and lawyers, along with breakouts tailored to attendees' experience level. The training was well-received, and Commission staff is exploring plans to

host another one in the future, along with branching out into online training on this and other topics.

The legal division also develops and delivers attorney training in conjunction with Litigation Committee meetings. At the 2019 Annual Meeting, the legal division developed and helped present a series of training presentations, including a skills presentation on writing a compelling brief and a discussion about the challenges of being a female attorney practicing tax law. For the Fall 2019 meeting, legal staff is planning attorney training with an emphasis on ethics. The presentations are generally webcast, and state attorneys receive free CLE credits for these trainings.

Litigation Support and Legal Advice

The legal division regularly consults with state attorneys, as requested, on tax litigation including litigation strategy, issues, arguments, and moot courts. The legal division has provided substantial legal consultation during this fiscal year to the states of South Carolina, Iowa, Illinois, Vermont, New Mexico, and Montana. The legal division also works with a group of state tax attorneys and with the National Association of Attorneys General to make sure that state attorneys general are aware of state cases in which the states may want to file joint amicus briefs.

The legal division also consults with individual states regarding draft legislation, draft regulations, and state tax policies. In recent months, states have reached out to the legal division for help with state issues resulting from federal tax reform, state tax reform, and the implementation of the *Wayfair* decision. With respect to implementation of *Wayfair*, the legal division has been assisted by National Nexus Program Director Richard Cram.

Support for the Commission's Programs and Projects

The legal division supports the Commission's Joint Audit and National Nexus Programs and other Commission programs and projects as requested. Recently, for example, the legal division has consulted with the Joint Audit Program on the issuance and enforcement of administrative subpoenas. The legal division also provides support for the Commission's general administration by addressing open meetings issues, maintaining confidentiality policies, handling records requests, researching and making recommendations for record retention policies, resolving lease disputes, reviewing contracts, and filing corporate registrations and reports.

Amicus Briefs Filed on Behalf of the Commission

The legal division recently filed briefs in *Steiner v. Utah State Tax Commission*, Utah Supreme Court Case No. 20180223-SC. The case was decided in the state's favor.

Publications

- Helen Hecht authored an article entitled “Fifty Years of MTC Uniformity Efforts: The Not-So-Obvious Lessons,” published in the July 2019 issue of the Journal of Multistate Taxation and Incentives.

D. Policy Research

Policy Research Director Elliott Dubin retired effective August 31, 2019. The policy research director had supported Commission efforts in addressing federal legislation with implications for state and local taxation and kept track of state adoption of Commission model statutes, regulations, and guidelines. He monitored research on the economic and fiscal impacts on the states resulting from the passage of the Tax Cuts and Jobs Act (TCJA). In addition, he participated in periodic local or online economic forums and seminars as well as in Commission working group teleconferences on *Wayfair* Implementation and Marketplace Facilitator Work Group and Combined Filing Model Working Group

He and former Policy Research Intern Emma Snyder updated information on current economic conditions and trends in state and local government finance for the Commission’s 52nd Annual Conference. Other work undertaken by the policy research director included consulting with the American Economics Group on evaluation of data models and data sources for estimating revenue impact of the *Wayfair v. South Dakota* decision, monitoring current economic conditions, and providing comments on Charles McLure’s articles for State Tax Notes on aspects of the *Wayfair* decision.

Policy Research Intern Emma Snyder completed her internship in August 2019.

E. Legislative Division

The legislative counsel and director:

- Monitors and analyzes federal legislation that affects states and sends alerts and analyses to member states as needed;
- Coordinates Commission responses to federal legislation and leverages the greater lobbying power of other state organizations by being a subject-matter resource;
- Educates congressional members and staff about the negative effects of preemption generally and with respect to specific bills;
- Answers questions from member states about federal bills and trends in state legislation;
- Monitors state legislation and consults with states when requested;
- Increases the visibility and reputation of the Commission through relationships with legislators and their staff, taxpayer organizations, other multistate, governmental organizations, the public, and other stakeholders in federal and state legislation that preempts or substantially affects state taxation;

- Maintains a list of federal and state bills with summary and status information at <http://www.mtc.gov/Resources/Legislation>; and
- Answers questions about the Commission's *Uniform Sales & Use Tax Exemption/Resale Certificate — Multijurisdiction*. We have been receiving an average of two contacts per day and explanations about the certificate are usually lengthy.

The legislative counsel continues to increase the visibility of the Commission and promotes it as the “gold standard” for tax policy development. Counsel focuses on state and federal legislators and their staffs; the Congressional Budget Office; and multistate organizations such as the National Governor’s Association, the Federation of Tax Administrators; the Streamlined Sales Tax Governing Board; and the National Conference of State Legislatures (NCSL) Executive Committee Task Force on State and Local Taxation. Awareness of the Commission among state legislators who serve on tax committees has historically been low; counsel is working with the NCSL to develop awareness and relationships among these legislators.

Legislative counsel is monitoring the following federal issues, among others —

Response to *Wayfair*

The federal response to *Wayfair* has been muted. Members from non-sales-tax states have introduced 11 bills. But Chairman Jerry Nadler (D-N.Y. 10th) of the House Committee on the Judiciary, which has jurisdiction over state tax bills, has demonstrated understanding of the dangers of state-tax preemption. He is unlikely to allow the committee to consider preemption bills. No such bill has gained much support. One non-sales-tax state has mobilized state resources to discourage enforcement of other states’ use-tax laws within its borders.

Almost all states have completed their legislative changes to require collection from remote vendors that exceed a de minimis threshold, usually more than \$100,000 sales per year. Some states include “or 200 or more transactions” per year. A somewhat smaller number of states have passed bills with respect to collection by marketplaces.

Digital Goods

Senator John Thune (R-South Dakota) and Senator Ron Wyden (D-Oregon) introduced S. 765 (no cosponsors). Representative Steve Cohen (D-Tennessee 19th) and Representative John Ratcliffe (R-Texas 4th) introduced H.R. 1725 (3 cosponsors), which is a companion to S. 765. Both bills were introduced on March 13, 2019. S. 765 has been referred to the Senate Committee on Finance, on which Mr. Thune serves. Senator Wyden is the ranking member. H.R. 1725 has been referred to the House Committee on the Judiciary, on which Mr. Cohen serves.

Both bills prohibit a state from taxing a digital good unless the state also taxes its tangible equivalent. They also require that the incidence of the tax be on the end user. States with digital goods laws already generally comply with these rules. Interestingly, neither bill creates original jurisdiction in federal district courts, a provision that has been included in previous state tax preemption bills.

Mobile Workforce

Senator John Thune (R-South Dakota) introduced S. 604 (35 cosponsors, roughly bipartisan). It prevents a state from taxing the income of a non-resident worker unless the worker engages in employment duties in the state for more than thirty days in the relevant tax year. However, Senator Chuck Schumer (D-New York) is the minority leader and has influence. He opposes the bill fiercely. New York estimates that the bill would reduce its revenue by \$100 million annually.

BATSA:

Rep. Steve Chabot (R-Ohio-1st) introduced H.R. 3603 (3 cosponsors), the Business Activity Tax Simplification Act, on June 3, 2019. The text is the same as last Congress' iteration except for the effective date. Supporters promote it as an update of P. L. 86-272 designed to reflect the contemporary economy. In reality it would hollow-out state taxation of multistate businesses. H.R. 3603 prohibits almost all state business-activity taxes (including net income, gross receipts, commercial activity, and business and occupation taxes) on entities doing business in a state by expanding protection to include intellectual property and services, allowing nexus-free physical presence in a state of fewer than 15 days (in contrast, the Mobile Workforce Act requires 30 days), exempting digital goods from taxation, and requiring states using combined or consolidated filing to use the *Joyce* apportionment method. A transliteration of the bill may be found on the MTC website in the Legislation portion of the Resources area.

SALT Deduction

This is a personal income tax issue. Legislators from states whose residents are heavily burdened by the Tax Cuts and Jobs Act's \$10,000 cap on state and local taxes that may be deducted federally have introduced at least eleven bills to either remove the cap or allow their states to employ work-arounds. States also have tried litigation and a number of workarounds. These efforts have largely failed. There is a slightly less than remote chance that a state will be able to effectively counter this federal tax law.

F. Training

The training staff supported the following activities since July 1, 2019:

Corporate Income Tax training

September 24 – 27, 2019, in Itasca, Illinois for 53 participants from the Alabama Department of Revenue, Arizona Department of Revenue, District of Columbia Office of Tax and Revenue, Idaho Office of the Attorney General, Idaho State Tax Commission, Iowa Department of Revenue, Kansas Department of Revenue, City of Kansas City, Missouri, Louisiana Department of Revenue, Maine Revenue Services, Minnesota Department of Revenue, Nebraska Department of Revenue, New York City Department of Finance, North Dakota Office of State Tax Commissioner, South Carolina Department of Revenue, Virginia Department of Taxation, and Washington Department of Revenue.

Other training conducted by Commission staff included a two-day facilitated corporate income training consultation for 35 participants from the South Carolina Department of Revenue.

The events and training coordinated the logistics for the 52nd Annual Meeting Week in Boise, Idaho, which included an off-site reception and dinner at the Basque Market. We appreciated the assistance provided by Mike Chakarun and others from Idaho when planning the week's activities.

The events and training staff also secured venues and researched potential sites for trainings and meetings that will occur later this year and in future years.

II. Administration

Elliott Dubin, Director of Policy Research, retired August 31, 2019. Elliott began his employment with the Commission in March 1999.

Georgetown University Law Center and the MTC have partnered to provide a 20% tuition discount to state and local tax government attorneys and qualified non-attorney tax professionals who matriculate in Georgetown's LL.M., MSL, or SALT Certificate Distance Learning programs. The MTC verifies qualifying employment for applicants seeking the discount.

Technology Addendum

The Checkpoint firewalls and firewall manager appliance in the D.C. data center are in the process of doing the operating system upgrade. The vendor has created backups and replicated the devices and are doing a trial upgrade in their labs. This ensures that any issues with the upgrade occur in the lab environment and not the production environment.

The need for an internal file sharing system for various departments, with varying requirements, is being addressed. Microsoft Teams, which is a part of our Office 365 suite, is being looked at to provide the collaboration (file sharing and beyond) needed by the various departments. This is strictly for 'internal' collaboration.

The Nexus Program director and staff, along with the network administrator, have identified a software developer to re-engineer the voluntary disclosure online application as well as the desktop application used by Nexus Program staff. The developer has spent many hours and interacted closely with the Nexus staff to flush out the business logic of the application. A proposal for that project should be forthcoming soon.

The network administrator is working with a Microsoft representative as well as a Microsoft vendor to review our current Microsoft infrastructure. The purpose is to more efficiently utilize the features of Office 365 that we currently use, as well as begin to utilize those features that we do not. In addition, we will begin laying the ground work for moving the Barracuda Backup server that is in the Chicago office into the MS government cloud once the Chicago office is closed.

Logistical planning has begun for the closure of the Chicago office in 2020.

The normal maintenance of server hardware in the D.C. and Chicago offices occurs on a regular basis through on-site visits by the network administrator.

III. Outside Presentations & Events

The executive director serves as a member of the following annual conference advisory boards: Georgetown University Law Center's State and Local Tax Institute, the Hartman State and Local Tax Forum, the New England State and Local Tax Forum, and New York University's State and Local Tax Institute.

The following are the programs, conferences, and other events of outside organizations at which members of the staff represented the Commission during the reporting period:

JULY

- 2019 SEATA Conference; *Recent and Significant Court Cases (Including Sales and Corporate Taxes)* (Disque, panelist); *Transfer Pricing Impact on State Corporate Income Tax* (Coon, panelist); *Behind Door 4: Tax Administration Behind the Scenes* (Stranburg, panelist); Lake Buena Vista, Florida
- AICPA State and Local Tax Technical Resource Panel (Cram, Hamer, panelists); Washington, D.C.
- Washington State Tax Conference; *Great Debate* (Hecht, panelist); Pullman, Washington
- NYU Summer Institute in Taxation: State & Local Taxation; *A View From the State Tax Administrators* (Stranburg, panelist); *State Tax Implications of Federal Tax Reform: Interest Limitations and Opportunity Zones* (Stranburg, panelist); New York, New York
- Webinar presentation for The Knowledge Group; *Ensuring Compliance with Tax Laws and Minimizing Audit Risks with Sales Tax Automation* (Cram, panelist)

AUGUST

- 2019 Texas State Taxation Conference; Houston, Texas (Mond)
- NCSL 2019 Legislative Summit and Executive Committee Task Force on State and Local Taxation meeting; Nashville, Tennessee (Shimkin)
- 2019 FTA Technology Conference and Exhibition; Detroit, Michigan (Lane, Worthington)
- 2019 MSATA Conference; *Murphy v. NCAA* (Matson, panelist); *Income Repatriation: GILTI/FDII* (Hecht, panelist); Cleveland, Ohio
- Council on State Taxation Mid-Atlantic Regional State Tax Seminar; (Matson, panelist); McLean, Virginia

SEPTEMBER

- New Mexico Legislature Revenue Stabilization and Tax Policy Committee, *Post Wayfair Gross Receipts Tax/Compensating Use Tax Administration Issues* (Hecht, Cram presenters)
- 2019 NESTOA Conference; *Murphy v. New Jersey* (Matson, panelist); *Reviewing Wayfair and Resulting State Law and Policy Changes* (Cram, panelist); *Marketplace Facilitators* (Cram, panelist); *Court Case Round-up – Important Cases Affecting State and Local Tax Administration* (Hecht, panelist); Providence, Rhode Island